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No. 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,
Petitioner

v.

RONALD BANKS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. This Case Closely Resembles *Overton v. Bazzetta*, A Decision Which Respondent Neither Criticizes Nor Distinguishes 1

II. Respondent's Challenge Is Properly Evaluated Under The Deferential Standard Of *Turner v. Safley* 2

III. The Restrictions Challenged In This Case Are Reasonably Related To The Legitimate Penological Interests Of Rehabilitation And Security. 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Little v. Norris,
787 F.2d 1241 (8th Cir. 1986) 5
McKune v. Lile,
536 U.S. 24 (2002) 4, 6
Overton v. Bazzetta,
539 U.S. 126 (2003) ..... passim
Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 5
Sandin v. Conner,
515 U.S. 472 (1995) 4
Shaw v. Murphy,
532 U.S. 223 (2001) 6
Thornburgh v. Abbott,
490 U.S. 401 (1989) 2
Turner v. Safley,
482 U.S. 78 (1987) ..... passim
U.S. v. Paramount Pictures, Inc.,
334 U.S. 131 (1948) 6
Wolff v. McDonnell,
418 U.S. 539 (1974) 4

Constitutional Provisions

U.S. CONST., Amend. I 1, 3, 5, 6

ARGUMENT

I. This Case Closely Resembles *Overton v. Bazzetta*, A Decision Which Respondent Neither Criticizes Nor Distinguishes.

As we said in our opening brief, the circumstances of this case are strikingly similar to those of *Overton v. Bazzetta*, 539 U.S. 126 (2003), in which the Court upheld Michigan rules which entirely banned visits to certain prisoners. In this case as in *Overton*, prison officials have imposed restrictions which implicate interests protected by the First Amendment: here an interest in receiving information from the outside world, and in *Overton* an interest in intimate association. *Id.*, at 131.[1] In this case as in *Overton*, the restrictions completely close off certain avenues for exercising those interests: here a ban on receiving newspapers, magazines and photographs, and in *Overton* a ban on visits, including even non-contact visits and visits from immediate family. *Id.*, at 130. In both cases, the restrictions are imposed for an indefinite period,[2] and are restored at the discretion of prison officials. *Ibid.* In both cases, the restrictions are applied to high-security prisoners who present disciplinary problems and who have "few privileges left to lose." *Id.*, at 134.[3] Finally, in

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[1] The Court in *Overton* found it unnecessary to decide whether or to what extent the asserted right of association survived incarceration. *Id.*, at 131-132.

[2] The regime upheld in *Overton* was in this respect more severe than Pennsylvania's. The ban on visits in *Overton* applied for a minimum of two years, *id.*, at 130, while the ban challenged in this case applies for a minimum of ninety days. J.A. 32.

[3] Again, in this respect the *Overton* regime was more severe than Pennsylvania's. Pennsylvania's restrictions apply only to the 0.1% of its prisoners who present the worst behavioral problems in the system, Br. for Pet. 3-6, while the

both cases prison officials sought to justify the restrictions – successfully, in *Overton* – as "a proper and necessary management technique to induce compliance with the rules of inmate behavior...." *Id.*, at 134.

Respondent and his amici do not ask the Court to overrule or limit *Overton*, nor do they make any serious attempt to distinguish this case from *Overton*; like the Court of Appeals, they simply proceed as if *Overton* was never decided at all. But if Michigan's restrictions, which banned visits but allowed newspapers, were constitutional, then it is difficult to see why Pennsylvania's restrictions, which ban newspapers but allow visits, are not. Certainly, respondent and his amici have offered no principled basis for such a departure from *Overton*.

II. Respondent's Challenge Is Properly Evaluated Under The Deferential Standard Of *Turner v. Safley*.

Respondent, for his part, concedes that the ultimate question in this case is whether Pennsylvania's policy is "'reasonably related to legitimate penological interests,'" Br. for Resp. 15, *quoting Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989), and that this question must be answered by applying the analytical framework of *Turner v. Safley*, 482 U.S. 78 (1987). Br. for Resp. 15-16. Some of his amici, however, urge the Court not to apply *Turner* at all, but instead to use some more heightened standard of review.[4] *See* Br. of American

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restrictions in *Overton* applied to all prisoners who committed two or more substance-abuse violations. *Id.*, at 130.

[4] Another issue raised by amici – that Pennsylvania's policy engages in impermissible "viewpoint discrimination" because it exempts legal and religious materials from its publications ban, *see* Br. for Prison Legal News *et al.* 16-17 – is not in this case at all. Respondent has never challenged

Civil Liberties Union *et al.* 4-14; Br. of Becket Fund for Religious Liberty 5-12. To some extent, their arguments are premised on the idea, as the brief for the United States puts it, "that prison privileges that implicate First Amendment interests are categorically different from other privileges." Br. for United States 25 n. 12; *see* Br. of ACLU 10-14. As we have already noted, however, the Court has consistently made it clear that *Turner's* deferential standard applies to challenges involving such privileges. *See* Br. for Pet. 21-22 (collecting cases); Br. for United States 25 n. 12.

In other respects, their argument is simple hyperbole. The repeated refrain of the amici, that the logic of our position has "no stopping point," Br. of ACLU 9; Br. of Becket Fund 3, seems to us a non sequitur which ignores the context in which Pennsylvania imposes its restrictions: as a final attempt to improve the behavior of the most dangerous and recalcitrant prisoners in its system, who have already failed to respond to lesser sanctions. We do not understand how our position could be taken to allow similar restrictions to be imposed upon all prisoners, whether or not they have misbehaved, *cf.* Br. of Becket Fund 9-11; it is difficult to see how either rehabilitation or security would be served by seeking to "modify" the behavior of prisoners who in fact have abided by prison rules. Still less do we understand how it could be thought to support *content-based* restrictions on speech disfavored by prison officials. *Cf.* Br. for ACLU 13. Such attempts, it seems to us, can rather easily be dealt with within the *Turner* framework.

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the policy on this basis. We note that the policy challenged in *Overton* likewise contained religious and legal exemptions from the ban on visits. *See id.*; 539 U.S. at 130. *See also* Br. for United States 17 n. 5 (Pennsylvania's policy is "neutral" within the meaning of *Turner*).

But the amici's main argument for discarding *Turner* in this case seems to be that Pennsylvania's LTSU policies, and particularly the justification offered to support them, are so different in kind from anything the Court has considered before that they should fall entirely outside of *Turner*. Thus, to one amicus, Pennsylvania has offered "a unique theory – the deprivation theory of human behavior" to support its policies, a theory which, in the amicus' view, is "incompatible with maintaining inmates' most fundamental constitutional rights." Br. of Becket Fund for Religious Liberty 3, 5. To another, Pennsylvania's goal of modifying respondent's violent and destructive behavior – which that amicus calls "general deterrence" – should simply be "rejected as illegitimate." Br. of ACLU 5 & n. 2. What these amici call "deprivation theory" and "general deterrence," however, is in our view just the common-sense idea that prisoners – like other people – are likely to respond to a regime of incentives and disincentives, and that prison administrators may legitimately rely on this fact to encourage decent behavior. Despite what these amici say, we submit that this idea is neither new nor untoward, and that it fits comfortably within *Turner's* framework.

As the Court has long recognized, regimes of rewards and punishments, to encourage desired behavior and to discourage and punish misbehavior, are a virtually universal feature of prison administration, *see, e.g., McKune v. Lile*, 536 U.S. 24, 30-31 (2002); *Sandin v. Conner*, 515 U.S. 472, 474-476 (1995); *Wolff v. McDonnell*, 418 U.S. 539, 545-549 (1974), and the Court has repeatedly recognized as legitimate the intertwined goals of institutional order, security and rehabilitation which such programs serve. *Overton*, 539 U.S. at 134 ("Withdrawing ... privileges is a proper and necessary management technique to induce compliance with the rules of inmate behavior..."); *McKune*, 536 U.S. at 39 ("An essential tool

of prison administration ... is the authority to offer prison inmates various incentives to behave").

The granting and withdrawal of privileges with First Amendment implications is a routine feature of many such programs.[5] *See, e.g., Overton*, 539 U.S. at 130 (visits); *McKune*, 536 U.S. at 30-31 (television); *Little v. Norris*, 787 F.2d 1241, 1243 (8th Cir. 1986) (personal correspondence); *see* Br. for Pet. 2 (describing Pennsylvania's disciplinary regime). But the Court has never suggested that the presence of this feature deprives such programs of the legitimacy they would otherwise enjoy, or imposes a need for any special justification beyond the obvious ones of order, security and rehabilitation. Certainly, the Court has never adopted the view of respondent's amici, that such privileges may not be withdrawn as a sanction for misbehavior in general, but only in response to specific abuses of the privileges. *See* Br. for ACLU 6. *Overton*, for example, did not hold that visitation privileges could only be withdrawn as a sanction for using visitors to smuggle drugs; and we are aware of no decision holding that, say, television privileges may only be withdrawn as a sanction for over-loud volume.

Once accepted, it is this idea – that privileges with First Amendment implications may only be withdrawn if they are specifically abused – which would have "no stopping point." While the amici carefully frame their argument in terms of prisoners' ability to learn about "political affairs and other news," Br. of ACLU 11, the interests protected by the First Amendment also encompass "the right ... to receive ... access to social ... esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Nor are First Amendment protections limited to print

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[5] As the United States points out, many of the most desirable privileges have such implications. Br. for United States 25 n. 12.

media. *See U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). In evaluating prison disciplinary systems, then, it would be impossible for the courts to draw any principled line between print and broadcast media, or between "political affairs and other news" on the one hand, and current events, sports, cultural events, education, and entertainment on the other. *See Shaw v. Murphy*, 532 U.S. 223, 230 (2001) (declining to assess the "value of ... content" in prison First Amendment case). The amici's principle, then, would certainly call into question a wide array of disciplinary sanctions – for example, access to television – which are routinely imposed and have never been thought to be constitutionally problematic.

The restrictions which Pennsylvania imposes on prisoners in the LTSU are no different in kind from those just discussed,[6] and the penological interests which Pennsylvania has proffered to support its policies are no different in principle from those offered in *Overton* and *McKune*. Respondent's challenge to those restrictions, like the challenges in *Overton* and *McKune*, can and should be discussed within *Turner's* analytical framework, and we turn next to that subject. –

III. The Restrictions Challenged In This Case Are Reasonably Related To The Legitimate Penological Interests Of Rehabilitation And Security.

1. As we said in our opening brief, Pennsylvania's policy of withdrawing and reinstating newspaper privileges – like the withdrawal and reinstatement of visiting privileges in *Overton* – has a "logical connection," *Turner*, 482 U.S. at 93 n.*, to important penological goals. By providing incentives for "inmate

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[6] They may, of course, differ in degree, but in the case of *Overton*, as we discussed above, even that is debatable. *See supra* at 1-2.

growth," J.A. 190, to these most difficult and intractable prisoners, the policy offers an opportunity for them to begin the process of becoming productive citizens, or at least to integrate into the general prison population.[7] J.A. 189. In addition to this rehabilitative goal, the policy serves prison security interests in two distinct ways. First, "rehabilitation" in this context means that the affected prisoners cease the violent and destructive behaviors which landed them in progressively more severe confinement in the first place; in this sense, rehabilitation and security are inextricably intertwined. Second, the policy reduces the opportunity for prisoners to do further damage by eliminating materials which can be used as crude tools, weapons or fuel.

To this, respondent and his amici make two equally odd responses. First, as to rehabilitation, they say that the deprivations imposed by Pennsylvania's policy are at once so draconian that the Court should subject the policy to the most searching review, *and* so trifling that no reasonable person could rationally think that they might achieve their goal of modifying behavior. *See* Br. for Resp. 22 ("how could Department officials have *reasonably* entertained the view that withholding a newspaper or a few photographs might succeed?") (emphasis in original); Br. of ACLU 20-21. This, of course, simply ignores the evidence that the policy has in fact had some success. When the record was made in this case, the LTSU had only been in existence for a

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[7] One of respondent's amici emphasizes the rehabilitative value of "allowing prisoners to become or remain informed and engaged citizens." Br. of ACLU 6. Whatever might be the merits of this idea as a general matter, it, like so much else said by and on respondent's behalf, ignores the context of this case. Allowing *these* prisoners access to newspapers and magazines has been signally ineffective in getting them even to follow prison rules, let alone become "informed and engaged citizens."

little over two years, and in that time had received a little over fifty prisoners. Of these, thirteen – about 25% – had either moved up from Level 2 to Level 1,[8] or had "graduated" out of the LTSU altogether.[9] While these results do not establish that the LTSU is a panacea for reforming intractable prisoners, they are far from negligible, and they are certainly enough to provide the "logical connection" which *Turner* requires.

Second, respondent argues that the ban on newspapers and magazines has no logical connection to furthering security, because the prisoners in Level 2 are permitted to have legal and religious materials which, in his view, could also be used improperly. Br. for Resp. 19-20. Apparently, respondent believes that Pennsylvania's policy is unconstitutional because it is not restrictive *enough*. Be that as it may, his view is not supported by either common sense or the judgment of prison officials. Unlike yesterday's newspaper, religious and legal materials are apt to retain their value to prisoners and thus are less likely to be used for mischief; Deputy Superintendent Dickson thought it "obvious[]" that prisoners are "less inclined to use their legal work or their religious materials" for improper purposes. J.A. 189. The policy's "logical connection" to security is thus not undermined at all by allowing Level 2 prisoners to have religious and legal materials.

2. Respondent and his amici attempt to support their view that the prisoners in Level 2 have no alternative means of communicating with the outside

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[8] Level 1 prisoners are permitted one newspaper and five magazines. J.A. 102.

[9] When Deputy Superintendent Dickson was deposed in August of 2002, thirty-six prisoners were held in Level 2 of the LTSU. J.A. 130. Three were held in Level 1, *ibid*, and ten more had "graduated" out of the LTSU altogether. J.A. 138. Two other prisoners had completed their sentences and been released from the LTSU to the community. *Ibid.*

world by characterizing these prisoners as "isolated," Br. for Resp. 11, "cut off," Br. of ACLU 10-11, and even "amputate[d]," Br. for Prison Legal News 4, from all sources of information. Like the prisoners in *Overton*, they see their alternative channels of communication and information – unlimited personal correspondence, visits from family, attorneys and chaplains, and books from the prison library – as insufficient, and like the prisoners in *Overton*, they are mistaken; as the Court said there, "[a]lternatives ... need not be ideal; they need only be available." *Id.* 539 U.S. at 135. One amicus, perhaps realizing this, suggests that the very availability of these alternatives "undermines the system of incentives necessary to the operation" of Pennsylvania's policy. Br. of Becket Fund for Religious Liberty 15. But of course, this is not so, precisely because those alternatives are *not* "ideal." In *Overton*, for example, the availability of correspondence as an alternative to in-person visits did not mean that visits were of no value to the *Overton* prisoners, nor did it undermine the value of those visits as an incentive to better behavior.

3. Respondent suggests that, instead of an outright ban on newspapers and magazines, prison officials should adopt what he calls the "easy alternative" of "deliver[ing] a periodical to an inmate's cell for a limited period of time and retriev[ing] the newspaper or magazine when the time expires." Br. for Resp. 29. This, in his view, would adequately address the security concerns which arise from the potential misuse of newspapers and magazines, and like the Court of Appeals, he brushes aside the costs associated with this measure.[10] Br. for Resp. 28-30; *see* Pet. App. 22a-

[10] Respondent does not endorse the Court of Appeals' other suggestion: escorting prisoners to the law library to read periodicals of their choosing, *see* Pet. App. 23a-24a, and it is easy to see why. The prisoners in Level 2 of the LTSU are so dangerous that only one may be released from his cell at

23a. Even on its own terms, this attempt to second-guess the judgment of prison administrators is unconvincing. Respondent's delivery-and-retrieval system would do nothing to prevent misbehavior before, or at the time of, the retrieval, nor would it be an "easy" matter to ascertain that every page of every prisoner's paper – say, the Sunday *New York Times* – had in fact been "retrieved."

The more important point is that respondent and his amici, like the Court of Appeals, simply ignore the policy's rehabilitative goals. The prisoners subject to the publications ban have "few other privileges left to lose," *Overton*, 539 U.S. at 134, and prison officials are "very limited in what we can ... give or deny" to them. J.A. 190. Respondent advances no alternative means by which prison officials can advance their important interests in persuading these prisoners to change their violent and destructive behavior. The only "alternative" left, then, is for prison officials simply to give up on rehabilitation, and to content themselves with physically restraining these prisoners from doing further damage, if necessary forever – or until they are set loose, un-rehabilitated, upon the outside world.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals and remand the case with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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any given time, and even then only with two guards and elaborate security precautions. J.A. 80-81, 191. The burden of the many additional trips to the law library which such a procedure would entail would be no small matter.

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